IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE SIDE

WRIT PETITION NO.5305 OF 2007

Shri Sikandar Akbarsaheb Mujawar : Petitioner
(Orig.Defendant)

V/s.

Shri Abdul Shukur Abdul Gani Jamadar : Respondent
(Orig.Plaintiff

...

Mr.I.M.Khairdi for the petitioner.

Mr.A.B.Borkar i/b. Mr.V.V.Purwant for the respondent.

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CORAM : S.A.BOBDE, J.

DATE : OCTOBER 24, 2007.

P.C.

1. Rule, returnable forthwith.

Mr.Borkar waives service for the respondent.

Heard by consent.

2. The learned trial Court has issued a witness summons merely because the Commissioner has submitted a report. Order XXVI Rule 10 of the C.P.C. reads as follows:-

> "**10. Procedure of Commissioner**.--(1) The Commissioner, after such local inspection as he deems necessary and after reducing to writing the evidence taken by him, shall return such evidence, together with his report in writing signed by him, to the

Court.

(2) **Report and depositions to be evidence in suit**.-- The report of the Commissioner and the evidence taken by him (but not the evidence without the report) shall be evidence in the suit and shall form part of the record; but the Court or, with the permission of the Court, any of the parties to the suit may examine the Commissioner personally in open Court touching any of the matters referred to him or mentioned in his report, or as to his report, or as to the manner in which he has made the investigation.

(3) **Commissioner may be examined in person**.--Where the Court is for any reason dissatisfied with the proceedings of the Commissioner, it may direct such further inquiry to be made as it shall think fit."

3. When the Commissioner’s report is received by the Court, the Court may permit that Commissioner himself to be examined in accordance with Order XXVI Rule 10. That by itself does not entitle the plaintiff to call another additional witness, particularly after the evidence in the matter is over. If the plaintiff wishes to examine any other witness, he would be entitled to make application in that regard. If the plaintiff chooses to do so, the trial Court may consider such application, according to law. However, there is no justification for issuing a witness summons for another witness, as has been done merely because the Commissioner’s report has been received by the Court. The impugned order is, therefore, bad and illegal and liable to be set aside.

4. The rule is made absolute accordingly.

S.A. BOBDE, J.